(1) 89-1876

No. _____

IN THE
Supreme Court of the United States
October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

JOHNNIE LEE JONES

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General of Florida

JOAN FOWLER
Assistant Attorney General
(Counsel of Record)

DEPARTMENT OF LEGAL AFFAIRS
111 Georgia Avenue, Room 204
West Palm Beach, Fl. 33401
(407) 837-5062

Attorneys for Petitioner

May 30, 1990

QUESTION PRESENTED

Where a defendant has been sentenced on two prior occasions and these sentences have been reversed based solely on invalid sentencing reasons, does the double jeopardy clause as interpreted by *North Carolina v. Pearce* and *United States v. DiFrancesco* limit the maximum sentence that can be imposed to the lesser of the two previous sentences?

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases *Page(s)*

STATUTES AND CONSTITUTIONS

OTHER SOURCES

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

JOHNNIE LEE JONES

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 15 F.L.W. S118 (Fla. March 1, 1990, Case No. 74,004). The State's petition for rehearing was denied on May 1, 1990. (Pet.App. A-1). This opinion was substituted for an opinion released on November 22, 1989, which was withdrawn upon Respondent's motion for rehearing (Pet.App. A-19).

The latest opinion in this case by the District Court of Appeal, Fourth District of Florida, is reported at 540 So.2d 245 (Fla. 4th DCA 1989)*[Jones III]*. (Pet.App. A-26). The second opinion by the District Court of Appeal, Fourth District of Florida, is reported at 526 So.2d 173 (Fla. 4th DCA 1988)*[Jones II]* (Pet.App. A-28). The original opinion by the District Court of Appeal, Fourth District of Florida, is reported at 502 So.2d 1375 (Fla. 4th DCA 1987)*[Jones I]* (Pet.App. A-30).

JURISDICTION

The Supreme Court of Florida issued its opinion on March 1, 1990, and denied rehearing on May 1, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, *United States Constitution,* provides in pertinent part:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...

Amendment XIV, Section 1, *United States Constitution,* provides in pertinent part:

> ...nor shall any state deprive any person of life, liberty or property, without due process of law...

Article I, Section 9, *Florida Constitution,* provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense...

STATEMENT OF THE CASE

Respondent was convicted in 1985 of third-degree murder, grand theft, and leaving the scene of an accident in violation of Sections 361.027(2), 782.04(4), 812.014(2)(a), Florida Statutes (1983). The trial court sentenced Respondent, utilizing the Florida habitual offender statute, Section 775.084, Florida Statutes (1983), to fifty years in prison. On appeal, the District Court of Appeal, Fourth District of Florida ("district court"), affirmed the convictions but determined that:

> a finding that defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. *State v. Whitehead,* 498 So.2d 863 (Fla. 1986).

> In addition, the trial court failed to attach written reasons for departure.

Jones v. State, 502 So.2d 1375, 1378 (Fla. 4th DCA 1987)*[Jones I].* The district court remanded for resentencing.

At resentencing, the trial court determined that the recommended guidelines range was three to seven years. Rule 3.701, *Florida Rules of Criminal Procedure (1984).* The trial court then imposed a twenty-five year sentence, giving three reasons for departure. The trial court took that action because it was of the opinion that the habitual offender statute was no longer valid in light of the new Florida sentencing guidelines. On the second appeal, the District Court of Appeal, Fourth District of Florida, held the sentence invalid:

> [b]ecause the sole reason initially given for departure from the guidelines, habitual offender status, was found invalid on appeal, the trial court cannot, upon resentencing, exceed the recommended sentence by ascribing the new reasons for departure. *See Shull v. Dugger,* 515 So.2d 748 (Fla. 1987).

Jones v. State, 526 So.2d 173, 174 (Fla. 4th DCA 1988) [*Jones II*].

The mandate for *Jones II* was issued on July 8, 1988, and a third sentencing was held on August 11, 1988. The trial judge reimposed a fifty-year sentence, based upon Jones' habitual offender status and the prior departure reasons. The trial judge expressly relied upon *Waldron v. State,* 529 So.2d 772 (Fla. 2d DCA 1988), which was released subsequent to *Jones II.*

Jones filed a motion to enforce the *Jones II* mandate on August 12, 1988, one day after the resentencing. In so doing, he was seeking to have the trial judge impose the recommended guidelines sentence. This motion was granted on

September 14, 1988. In the meantime, Jones timely filed an appeal from the August 11 resentencing. The state filed a motion for rehearing directed toward the order granting Jones' motion to enforce the mandate and also requested the district court of appeal to vacate the mandate enforcement order. On December 2, 1988, the district court vacated its order enforcing the mandate and consolidated its *Jones II* decision with the notice of appeal from the third sentence.

In *Jones III,* the district court reconsidered its *Jones II* opinion and affirmed the third sentence, noting that it previously had not addressed the adequacy of the reasons for departure in its *Jones I* decision and had relied on the Supreme Court of Florida's decision in *Shull v. Dugger,* 515 So.2d 748 (Fla. 1987), for its holding requiring a reversal of the sentence in *Jones II.* The district court reconsidered these decisions and, relying on the Second District Court of Appeal's interpretation of *Shull* in *Waldron,* concluded that the first sentencing of Jones as an habitual offender statute did not constitute a bar to a subsequent enhancement of his sentence. Respondent sought review of this decision in the Supreme Court of Florida.

The Supreme Court of Florida held that the district court of appeal had jurisdiction to review the third sentencing, and also had the authority to change the law of the case previously set forth in *Jones I* and *Jones II.* Although in the original opinion issued November 22, 1989, the Supreme Court of Florida affirmed the fifty-year sentence, in its opinion issued on rehearing, the Supreme Court of Florida held:

> However, as to this petitioner, the double jeopardy principles set forth in *North Carolina v. Pearce,* 395 U.S. 711 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the

> district court of appeal in *Jones III* were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have had the opportunity to apply the law had the petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence. *Brown v. State,* 521 So.2d 110 (Fla.), *cert. denied,* 109 S.Ct. 270 (1988); *Troup v. Rowe,* 283 So.2d 857 (Fla. 1973); *Pearce.* We agree with the petitioner that while a departure sentence of more than three-to-seven years would stand because of the *Waldron-Roberts* rationale, the rationale cannot be used to impose a harsher sentence than that imposed in the second sentencing of this petitioner.

Jones v. State, 15 F.L.W. S118 (Fla. March 1, 1990, Case No. 74,004). The State of Florida filed its motion for rehearing on March 12, 1990; which was denied by the Supreme Court of Florida on May 1, 1990 (Pet.App. A-2).

REASONS FOR GRANTING THE WRIT

Issues involving the interpretation of the Double Jeopardy Clause are beginning to arise in jurisdictions which have implemented sentencing guidelines procedures in criminal cases. Florida has used guidelines for nearly seven years and this case presents the unique question of how double jeopardy guarantees fit into a body of law seeking to insure uniformity in approach to sentencing.

The decision below holds that the double jeopardy provision of the fifth amendment, and the equal protection clause of the fourteenth amendment, prohibit the imposition of the original sentence imposed on a criminal defendant at his third sentencing when the defendant successfully appealed the original sentence, successfully appealed the second lesser sentence imposed on him, and the case was again remanded for resentencing.

The decision below is in direct conflict with this court's opinion in *United States v. DiFrancesco,* 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), which involved the imposition of a greater sentence on a criminal defendant as a result of a government appeal from the sentence. In *DiFrancesco,* this court held:

> The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

449 U.S. at 132. According to *DiFrancesco,* there are fundamental differences between a sentence and an acquittal, and that the pronouncement of sentence has never carried the finality that attaches to an acquittal. *Id.,* 449 U.S. at 133-134. Citing inapposite cases, Florida's highest court deemed the reimposition of an original fifty year term, after intervening appeals, a violation of the double jeopardy guarantee. Certiorari is necessary to clarify this conflict and insure uniformity in guidelines procedures.

The seminal case on double jeopardy as recognized by the Supreme Court of Florida in the instant opinion is *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). It held that the equal protection clause of the Fourteenth Amendment does *not* impose an absolute bar to a more severe sentence upon reconviction, but that the due process clause of the Fourteenth Amendment demands that vindictiveness against a defendant for having successfully attacked his conviction must not play a part in the sentence he receives after a new trial. A violation of respondent's due process rights was not alleged below, and there was no showing of vindictiveness in the instant case, where the trial judge merely reinstated the initial sentence given to respondent. In this regard, the instant opinion conflicts with *Adamson v. Ricketts,* 865 F.2d 1011, 1019 (9th Cir. 1988)(en banc), *cert. pending,* case no. 88-1553. (Defense has affirmative obligation to raise a presumption of vindictiveness prior to gaining *Pearce* relief).

The decision below also conflicts with *Moon v. Maryland,* 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 2d 262 (1970). In *Moon,* the trial judge originally sentenced Moon to a term of twelve years' imprisonment. After a successful appeal, and after a second trial, Moon was sentenced to a term of twenty years' imprisonment. In dismissing the writ of certiorari as improvidently granted, this court held that there is no constitutional bar to a greater sentence after a success-

ful appeal, as long as the sentence is based on " 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' " *Id.*, 398 U.S. at 320.

More recently, in *Alabama v. Smith,* 490 U.S. ___, 109 S.Ct. ___, 104 L.Ed.2d 865 (1989), this court outlined a strict limit on the "presumption of vindictiveness" outlined in *Pearce.* Of particular importance is the following passage from *Smith*:

> While the Pearce opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' As we explained in Texas v. McCullough, 'the evil the [Pearce] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.' Because the Pearce presumption 'may operate in the absence of any proof of an improper motive and thus... block a legitimate response to criminal conduct,' we have limited its application, like that of 'other' judicially created means of effectuating the rights secured by the [Constitution],' ' to circumstances 'where its 'objectives are thought most efficaciously served.' ' *Such circumstances are those in which there is a 'reasonable likelihood,' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.* Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.

> In *Colten v. Kentucky,* for example, we refused to apply the presumption when the increased sentence was imposed by the second court in a two-tier system which gave a defendant convicted of a misdemeanor in an inferior court the right to trial de novo in a superior court. We observed that the trial de novo represented a 'completely fresh determination of guilt or innocence' by a court that was not being 'asked to do over what it thought it had already done correctly.' If the de novo trial resulted in a greater penalty, we said that 'it no more follows that such a sentence is a vindictive penalty...than that the inferior court imposed a lenient penalty.' Consequently, we rejected the proposition that greater penalties on retrial were explained by vindictiveness 'with sufficient frequency to warrant the imposition of a prophylactic rule.' Similarly, in Chaffin v. Stynchcombe, we held that no presumption of vindictiveness arose when a second jury, on retrial following a successful appeal, imposed a higher sentence than a prior jury. We thought that a second jury was unlikely to have a 'personal stake' in the prior conviction or to be 'sensitive to the institutional interest that might occasion higher sentences.'
>
> We think that the same reasoning leads to the conclusion that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. (Emphasis added).

Accord, Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). Likewise, the United States Circuit Court of Appeals, Eleventh Circuit, has recently stated:

> Moreover, any expectation of finality in a sentence is wholly absent where, as here, the defendant requested that his prior sentenced be nullified. The defendant has, by his own hand, defeated his expectation of finality, and "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott,* 437 U.S. 82, 99, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978); *cf. Jones,* 722 F.2d at 635 (judge, as opposed to defendant, increased legitimate sentence *sua sponte*); *Fogel,* 829 F.2d at 89 (defendant retained expectation of final because, *inter alia,* he did not challenge his original sentence).

United States v. Cochran, 883 F.2d 1012 (11th Cir. 1989).

Given this court's strict interpretation of what constitutes a violation of the Double Jeopardy clause, petitioner contends that certiorari must be granted and the Supreme Court of Florida's decision quashed. This case does not involve allegations of vindictiveness or record evidence of vindictiveness. The trial court merely reinstated Jones' original sentence after a series of defense initiated appeals which concluded at the same time that the Supreme Court of Florida ultimately resolved a number of issues surrounding the workings of Florida's sentencing guidelines process. Review of the three *Jones* opinions should convince this Honorable Court that neither the state nor the trial court placed the respondent twice in jeopardy for the same offense.

The Supreme Court of Florida's reliance on *Brown v. State,* 521 So.2d 110 (Fla.), *cert. denied,* 109 S.Ct. 270 (1988); and *Troupe v. Rowe,* 283 So.2d 857 (Fla. 1973), is misplaced. *Brown* involved a situation where the trial judge, based

upon an erroneous interpretation of the law, sentenced Brown to life imprisonment rather than death by electrocution after his conviction for the crime of first degree murder. The Supreme Court of Florida held that once a life sentence was imposed, the sentencing phase of a capital case could not be reopened to allow the trial court to impose the death penalty. Specifically the court noted:

> The facts of this case are on point with *Rumsey*. There the trial court erred in ruling that the death penalty could not be imposed, but, upon reversal and remand, imposed a death sentence. Relying on *Bullington*, both the Arizona and United States Supreme Courts held that the erroneous ruling acquitted the defendant of the death penalty and terminated jeopardy. Accordingly, it was held to be a violation of double jeopardy to reopen the sentencing phase and to impose the death penalty. The state attempts to distinguish *Rumsey* and *Bullington* by arguing that the judge did not conduct a penalty phase as required by section 921.141 and that the life sentence was thus illegal. We disagree. The judge opened the penalty by hearing arguments and by ruling on a matter of law which did not require the presence of the jury. Even though the ruling was erroneous, the procedure was correct. Having so ruled, it would have been a futile exercise to present evidence of aggravation and mitigation to the jury or to pronounce a "but for" *Enmund* death sentence. Life imprisonment is a legal sentence under section 921.141 and we are not faced with a sentence contrary to statute. On the authority of *Rumsey*, we quash that portion of the district court opinion reversing the life sentence and remand the case for further proceedings consistent with this opinion. *Id* at 112.

In *Troupe v. Rowe,* after a guilty plea and imposition of sentence, a state prosecutor sought to reopen the sentencing proceeding over the objection of the defendant. The Supreme Court of Florida found that reopening the sentencing proceeding would violate the defendant's protection against Double Jeopardy. Thus, the rule of *Troupe* is that the state may not initiate proceedings to impose harsher punishment over the objection of the defendant.

Neither case involves a situation similar to this case. Respondent was originally sentenced to fifty years pursuant to the Florida habitual offender statute for the crimes of third-degree murder, grand theft, and leaving the scene of an accident.

During respondent's litigation of his appeals, case law from the Supreme Court of Florida made it clear that it's decision in *Whitehead v. State,* 498 So.2d 863 (Fla. 1986), the basis for reversal in *Jones I,* did not prevent trial courts from using the habitual offender statute to insure maximum sentencing could occur. *See e.g., Winters v. State,* 522 So.2d 816 (Fla. 1988); *State v. Brown,* 530 So.2d 51 (Fla. 1988); *Tillman v. State,* 525 So.2d 862 (Fla. 1988)(court held a defendant could be sentenced as an habitual offender and given a guidelines departure sentence).

With the benefit of the clarified case law, upon the second remand, the trial judge reinstated the original sentence imposed on Respondent: fifty years as an habitual offender.

The fifty-year sentence would only have been in violation of the constitutional protections against double jeopardy if it could be found that second sentence amounted to an acquittal. It did not. The last sentence imposed was identical to the original sentence given Respondent. The only reason that a lesser sentence was imposed after the first remand was because the case law as to the sentencing guidelines and the habitual offender statute was unclear, and the judge

erred on the side of caution. There certainly can be no finding of vindictiveness in such a situation where a more lenient sentence was given merely due to the confusing status of the case law at that time.

CONCLUSION

The State of Florida prays that this Honorable Court grant certiorari review, and summarily reverse the Supreme Court of Florida upon authority of *United States v. DiFrancesco* and the other cases cited above. Alternatively, the petitioner prays the court will accept the case and order briefing on the merits.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JOAN FOWLER
Assistant Attorney General
Counsel of Record

Department of Legal Affairs
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

JOHNNY LEE JONES,

Respondent.

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General of Florida

JOAN FOWLER
Assistant Attorney General
(Counsel of Record)

DEPARTMENT OF LEGAL AFFAIRS
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(407) 837-5062

Attorneys for Petitioner

TABLE OF CONTENTS

Supreme Court of Florida

Tuesday, May 1, 1990

JOHNNIE LEE JONES,
Petitioner,

vs.

Case No. 74,004
District Court of Appeal
4th District -
Nos.87-2427 & 88-2449

STATE OF FLORIDA,
Respondent.

Respondent's Motion for Rehearing filed in the above cause is hereby denied.

Respondent's Motion for Stay of Mandate is granted; however, the proceedings in this Court, in the District Court of Appeal, Fourth District, and in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida are stayed only to and including May 31, 1990, to allow respondent to seek review in the Supreme Court of the United States and obtain any further stay from that court.

EHRLICH, C.J., OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, J.J., concur.

True Copy
_____/s/_____
SID J. WHITE
Clerk, Supreme Court
TC

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Stanton S. Kaplan, Judge
Margaret Good, Esquire
Joan Fowler, Esquire

IN THE

Supreme Court of Florida

JOHNNIE LEE JONES,

Petitioner,

vs. Case No. 74,004

STATE OF FLORIDA,

Respondent.

MOTION FOR REHEARING, OR IN THE ALTERNATIVE, MOTION FOR STAY OF MANDATE

COMES NOW Respondent, the State of Florida, by and through undersigned counsel, and moves for Rehearing, or in the alternative, moves for stay of mandate pending certiorari review by the Supreme Court of the United States in the above-styled case, and as grounds therefor states:

1. In its opinion on rehearing in the above-styled cause, issued March 1, 1990, this court held that

> However, as to this petitioner, the double jeopardy principles set forth in *North Carolina v. Pearce,* 395 U.S. 711 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the district court of appeal in *Jones III* were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have had the opportunity to apply that law had the petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence. *Brown*

> *v. State*, 521 So.2d 110 (Fla.) *cert. denied*, 109 S.Ct. 270 (1988); *Troup (sic) v. Rowe*, 283 So.2d 857 (Fla. 1973); *Pearce*. We agree with the petitioner that, while a departure sentence of more than three-to-seven years would stand because of the *Waldron/Roberts* rationale, the rationale cannot be used to impose a harsher departure sentence than that imposed in the second sentencing of this petitioner. (slip opinion at pp. 4-5).

2. Respondent respectfully submits that this court has misapplied the doctrine of double jeopardy to the facts of this case, and that affirmance of the fifty-year habitual offender sentence is mandated.

3. As an initial matter, *Brown v. State* and *Troupe v. Rowe* are inapplicable *sub judice*. *Brown* involved a situation where the trial judge, based on an erroneous interpretation of the law, sentenced Brown to life imprisonment for a conviction of first degree murder. This court held that once the sentence was imposed, the sentencing phase could not be reopened to allow the trial court to impose the death penalty. That situation is distinguishable from the procedural posture of this case: which involves a sentence imposed after a successful appeal from the sentence earlier imposed.

Troupe v. Rowe is also distinguishable. In that case, sentence was imposed after a guilty plea, and over the defendant's objection, a second state attorney sought to have the sentencing proceedings reopened so that a harsher penalty could be imposed. This court held that that would violate the defendant's constitutional protection against double jeopardy.

4. Since there are no Florida cases directly addressing this issue, a proper analysis of the double jeopardy ramifications of Jones' latest sentence must be undertaken in view of the

United States Supreme court case law on the issue. A review of the federal cases mandates a finding that the imposition of the same sentence on Jones as was originally imposed was constitutional, and should have been upheld by this court.

5. The seminal case on double jeopardy is *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which held that the equal protection clause of the Fourteenth Amendment does *not* impose an absolute bar to a more severe sentence upon reconviction, but the due process clause of the Fourteenth Amendment requires that vindictiveness against a defendant for having successfully attacked his conviction must not play a part in the sentence he receives after a new trial. There was not vindictiveness present in the instant case, where Judge Kaplan merely reinstated the initial sentence given to Petitioner.

6. A companion case to *North Carolina v. Pearce* is even more enlightening. *Moon v. Maryland* 398 U.S 319, 90 S.Ct. 1730, 26 L.Ed. 2d 262 (1970). In *Moon v. Maryland,* the trial judge originally sentenced Moon to a term of twelve years' imprisonment. After a successful appeal, and after a second trial, Moon was sentenced to a term of twenty years' imprisonment. In dismissing the writ of certiorari as improvidently granted, the court held that there is no constitutional bar to a greater sentence after a successful appeal, as long as the sentence is based on " 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' " *Id.,* 398 U.S. at 320.

7. More recently, the United States Supreme Court addressed the issue of double jeopardy in *Texas v. MCullough,* 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). In *Texas v. McCullough,* the court held that due process was not violated by the imposition of a greater sentence on McCullough after a retrial where the *facts of the case provided*

no basis for a presumption of vindictiveness, and even if there were a presumption of vindictiveness, the findings by the trial judge were sufficient to overcome that presumption. In the instant case, Petitioner has *never* asserted that Judge Kaplan acted vindictively in sentencing him the third time. In fact, such an assertion would be completely unfounded, since Judge Kaplan was merely reinstating the original sentence imposed. The reasons for the second sentence will be addressed later in this motion.

8. The most recent pronouncement on double jeopardy by the United States Supreme Court was in *Alabama v. Smith,* 490 U.S. ___, 109 S.Ct. ___, 104 L.Ed.2d 865 (1989). *Alabama v. Smith* severely limited the presumption of vindictiveness relied on in *North Carolina v. Pearce.* The court held:

> While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that *its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence* on retrial.' As we explained in Texas v. McCullough, *'the evil the [Pearce] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.'* Because the Pearce presumption 'may operate in the absence of any proof of an improper motive and thus...block a legitimate response to criminal conduct, 'we have limited its application, like that of 'other' judicially created means of effectuating the rights secured by the [Constitution],' ' to circumstances 'where its objectives are thought most efficaciously served.' ' Such circumstances are those in which there is a 'reasonable likelihood,' that the increase in sentence is the product of actual vindictiveness on the part

of the sentencing authority. *Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.*

In Colten v. Kentucky, for example, we refused to apply the presumption when the increased sentence was imposed by the second court in a two-tier system which gave a defendant convicted of a misdemeanor in an inferior court the right to trial de novo in a superior court. We observed that the trial de novo represented a 'completely fresh determination of guilt or innocence' by a court that was not being 'asked to do over what it thought it had already done correctly.' If the de novo trial resulted in a greater penalty, we said that 'it no more follows that such a sentence is a vindictive penalty ... than that the inferior court imposed a lenient penalty.' Consequently, *we rejected the proposition that greater penalties on retrial were explained by vindictiveness* 'with sufficient frequency to warrant the imposition of a prophylactic rule.' Similarly, in Chaffin v. Stynchcombe, we held that no presumption of vindictiveness arose when a second jury, on retrial following a successful appeal, imposed a higher sentence than a prior jury. We thought that a second jury was unlikely to have a 'personal stake' in the prior conviction or to be 'sensitive to the institutional interest that might occasion higher sentences.'

We think that the same reasoning leads to the conclusion that when a second penalty is imposed after trial than was imposed after a prior guilty plea, *the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge.* (citations omitted; emphasis added). *Id.*, 104 L.Ed.2d at 872-874.

9. The United States Supreme Court has refined the holding in *North Carolina v. Pearce* to find that when a greater sentence is imposed after a successful appeal, it is more likely than not attributable to sentencing considerations, and not to vindictiveness. There is no longer a *presumption* of vindictiveness. Therefore, the burden would have been on Petitioner to establish that the greater sentence was caused by vindictiveness on the part of the sentencing judge. Petitioner has never alleged that vindictiveness was the cause of the greater sentence. Accordingly, the sentence imposed on Jones in *Jones III,* which was based on legal considerations completely unrelated to any vindictiveness, did not violate the constitutional prohibition against double jeopardy.

10. Petitioner was originally sentenced to fifty years pursuant to the habitual offender statute for the crimes of third-degree murder, grand theft, and leaving the scene of an accident. *Jones v. State,* 502 So.2d 1375, 1387 (Fla. 4th DCA 1987)*[Jones I].* The Fourth District Court of Appeal remanded the cause for resentencing. *Id.* At the second sentencing, Judge Kaplan did not habitualize Petitioner and therefore sentenced Petitioner to a twenty-five year sentence as a guidelines departure sentence. The Fourth District Court of Appeal again reversed the cause for resentencing. *Jones v. State,* 526 So.2d 173, 174 (Fla. 4th DCA 1988)*[Jones II].*

11. A review of the re-sentencing hearing held on August 13, 1987 (Exhibit C in Respondent's Appendix to its brief on the merits) reflects that the *only* reason that Judge Kaplan did not re-sentence Petitioner to the same term of years was because his interpretation of *Whitehead v. State,* 498 So.2d 863 (Fla. 1986), was that a habitual offender sentence would not be upheld:

[The Prosecutor]: Your Honor is not going to find him an habitual offender? I understand the Court's ruling.

The Court: I don't feel that ts is going to be upheld.

(R 15, 4 DCA Case No. 87-2427; p.15, Exhibit C)

Judge Kaplan then sentenced Petitioner to the maximum legal sentence which could be imposed on Petitioner without using the habitual offender statute: twenty-five years. *Jones II.*

12. Subsequent case law from this court has made it clear that *Whitehead* did not prevent trial courts from using the habitual offender statute. *See e.g., Winters v. State,* 522 So.2d 816 (Fla. 1988); *State v. Brown,* 530 So.2d 51 (Fla. 1988). It was not until this court issued its opinion in *Tillman v. State,* 525 So.2d 862 (Fla. 1988) that it became completely clear that a defendant could be sentenced as an habitual offender, and given a guidelines departure sentence.

13. With the benefit of the clarified case law, upon the second remand, Judge Kaplan reinstated the original sentence imposed on Petitioner: fifty years as an habitual offender. This sentence was approved by the Fourth District Court of Appeal in *Jones v. State,* 540 So.2d 245 (Fla. 4th DCA 1989)*[Jones III],* and by this court in its original opinion issued in this case.

14. The fifty year sentence would only be in violation of the constitutional protections against double jeopardy if it could be found that Judge Kaplan imposed the sentence out of vindictiveness. He did not. The sentence imposed was identical to the original sentence given Petitioner. The only reason that a lesser sentence was imposed after the first remand was because the case law as to the sentencing guidelines and the habitual offender statute was unclear,

and the judge erred on the side of caution. There certainly can be no finding of vindictiveness in such a situation where a more lenient sentence was given merely due to the confusing status of the case law at that time. The fifty-year habitual offender sentence must stand. To find otherwise is tantamount to ordering Petitioner's immediate release.

15. As a housekeeping matter, the petitioner's name in *Troupe v. Rowe,* is misspelled on page five of the slip opinion *(Troup),* and should be corrected before publication of this opinion.

16. If this court should decline to grant Respondent's motion for rehearing, Respondent would request that this court stay the issuance of mandate until the United States Supreme Court resolves this case upon certiorari review.

WHEREFORE, Respondent respectfully requests that this Honorable Court grant its Motion for Rehearing, or in the alternative, Motion for Stay of Mandate in the above-styled cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

_____/s/_____
JOAN FOWLER
Assistant Attorney General
Florida Bar Number 0339067

DEPARTMENT OF LEGAL AFFAIRS
111 Georgia Avenue, Room 204
West Palm Beach, Fl 33401

(407) 837-5062

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by courier, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, 9th Floor/Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401 this 12 day of March, 1990.

_____/s/_____
JOAN FOWLER

Supreme Court of Florida

Thursday, March 1, 1990

JOHNNIE LEE JONES,

Petitioner,

vs. Case No. 74,004

STATE OF FLORIDA,

Respondent.

The motion for rehearing is granted. The opinion filed in this case on November 22, 1989, is withdrawn and the following opinion dated March 1, 1990, is substituted in lieu thereof.

A True copy:

_____/s/_____
Sid J. White
Clerk, Supreme Court

cc: Clyde L. Heath, Clerk
Robert E. Lockwood, Clerk
Hon. Stanton S. Kaplan
Margaret Good, Esquire
Joan Fowler, Esquire

Supreme Court of Florida

No. 74,004

JOHNNIE LEE JONES, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[March 1, 1990]

OVERTON, J.

We have for review *Jones v. State*, 540 So. 2d 245 (Fla. 4th DCA 1989)*[Jones III]*, in which the district court affirmed a departure sentence imposed on remand. The underlying issue concerns the authority of the sentencing judge, in a resentencing proceeding, to depart from the recommended guidelines sentence. We accepted jurisdiction because of direct conflict with *Harrison v. State*, 523 So. 2d 726 (Fla. 3d DCA 1988).* We approve the legal analysis of the district court in the instant case, but find that the maximum sentence that can be imposed upon the petitioner is twenty-five years.

This case comes to us in a very unusual procedural posture. Jones was convicted in 1985 of third-degree murder, grand theft, and leaving the scene of an accident. The trial court sentenced Jones, solely under the habitual offender statute, to fifty years in prison. On appeal, the district court affirmed the convictions but determined that

---

* We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

> a finding that defendant is a habitual offender is not a permissible basis for departure from the sentencing guidelines. *State v. Whitehead,* 498 So.2d 863 (Fla. 1986).
>
> In addition, the trial court failed to attach written reasons for departure.

Jones v. State, 502 So. 2d 1375, 1378 (Fla. 4th DCA 1987)*[Jones I].* The district court then remanded the case for resentencing.

At resentencing, the trial court determined that the recommended guidelines range was three to seven years. The trial court then imposed a twenty-five year sentence, giving three reasons for departure. On appeal, the district court held the sentence invalid, ruling that

> [b]ecause the sole reason initially given for departure from the guidelines, habitual offender status, was found invalid on appeal, the trial court cannot, upon resentencing, exceed the recommended sentence by ascribing the new reasons for departure. *See Shull v. Dugger,* 515 So.2d 748 (Fla. 1987).

Jones v. State, 526 So. 2d 173, 174 (Fla. 4th DCA 1988) *[Jones II].*

The mandate for *Jones II* was issued on July 8, 1988, and a third sentencing was held on August 11, 1988. The trial judge reimposed a fifty-year sentence, based upon Jones' habitual offender status and the prior departure reasons. The trial judge expressly relied upon the Second District Court's decision in *Waldron v. State,* 529 So. 2d 772 (Fla. 2d DCA 1988), released subsequent to *Jones II,* believing that *Waldron* allowed him to impose the initial fifty-year sentence. Jones filed a motion to enforce the *Jones II* mandate on August 12, 1988, one day after the resentencing. In so doing, he was seeking to have the trial judge impose the

recommended guidelines sentence. This motion was granted on September 14, 1988. In the meantime, Jones timely filed an appeal from the August 11 resentencing. The state filed a motion for rehearing directed toward the order granting Jones' motion to enforce the mandate and also requested the district court of appeal to vacate the mandate enforcement order. On December 2, 1988, the district court vacated its order enforcing the mandate and consolidated its *Jones II* decision with the notice of appeal from the third sentence.

In *Jones III,* the district court reconsidered its *Jones II* decision and affirmed the third sentence, noting that it previously had not addressed the adequacy of the reasons for departure in its *Jones I* decision and had relied on our decision in *Shull v. Dugger,* 515 So. 2d 748 (Fla. 1987), for its holding requiring a reversal of the sentence in *Jones II.* The district court reconsidered these decisions and, relying on the Second District Court's interpretation of *Shull* in its *Waldron* decision, concluded that the first sentencing of Jones, which resulted in a sentence enhanced by the application of the habitual offender statute, did not constitute a bar to subsequent enhancement of his sentence based upon written reasons supporting an upward departure from the sentencing guidelines' recommended range. Since the district court of appeal had jurisdiction to review the third sentencing, it also had the authority to change the law of the case previously set forth in *Jones I* and *Jones II. See Strazzulla v. Hendrick,* 177 So. 2d 1 (Fla. 1965).

In our recent decision in *Roberts v. State,* 547 So. 2d 129 (Fla. 1989), we approved *Waldron.* In *Roberts* and in *State v. Betancourt,* No. 73,806 (Fla. Nov. 22, 1989), we distinguished those resentencings where the judge in the original sentencing did not know that he had to set forth reasons for departure from those resentencings where the judge pre-

viously had departed from the guidelines and set forth reasons for departure.

In *Shull,* the judge imposed a sentence in excess of the guidelines recommendation for the announced reason that the defendant had been found to be an habitual offender. When this was determined to be an invalid reason for departure, this Court held that upon resentencing the trial judge could not state new reasons for departure. Implicit in this ruling was our desire to preclude the possibility of a judge providing the an after-the-fact justification for a previously imposed departure sentence. However, in the instant case, the judge simply sentenced Jones as an habitual offender. Neither the judge nor counsel made any reference to the sentencing guidelines, and the record contains no guidelines scoresheet. This was not a case where the judge relied upon a reason for departure that was later declared invalid but, rather, one in which the judge considered his sentence to be one to which the guidelines did not apply.

We find that the decision of the district court of appeal in *Jones III* is consistent with our decisions in *Roberts* and *Betancourt,* and that the conflict with *Harrison* has been resolved by those decisions. However, as to this petitioner, the double jeopardy principles set forth in *North Carolina v. Pearce,* 395 US. 711 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the district court of appeal in *Jones III* were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have the opportunity to apply that law had the petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence. *Brown v. State,* 521 So.2d 110 (Fla.), *cert. denied,* 109 S.Ct. 270 (1988); *Troup v. Rowe,* 283 So.2d 857 (Fla.

1973); *Pearce*. We agree with the petitioner that, while a departure sentence of more than three-to-seven years would stand because of the *Waldron-Roberts* rationale, the rationale cannot be used to impose a harsher departure sentence than that imposed in the second sentencing of this petitioner.

We approve the legal analysis in the district court's *Jones III* opinion, but find that the maximum sentence that can be imposed by the trial court is twenty-five years. Accordingly, we quash that portion of the district court's decision approving the trial court's imposition of a fifty-year sentence and remand this cause for further proceedings consistent with this opinion.

It is so ordered.

EHRLICH, C.J., and McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

IN THE

Supreme Court of Florida

JOHNNIE LEE JONES,

Petitioner,

vs. Case No. 74,004

STATE OF FLORIDA,

Respondent.

RESPONSE TO MOTION FOR REHEARING

COMES NOW Respondent, by and through undersigned counsel, and hereby opposes Petitioner's Motion for Rehearing, and in so doing states:

1. Appellant's Motion for Rehearing is in clear contravention of Fla.R.App.P. 9.330 which states the motion shall not reargue the merits of the court's order.

2. The instant motion for rehearing presents nothing more than mere reargument of an issue already thoroughly explored in the merits briefs.

WHEREFORE, Petitioner respectfully requests that the instant motion for rehearing be denied.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

_____/s/_____

JOAN FOWLER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062
Florida Bar No. 339067
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Response to Motion for Rehearing" has been furnished, by courier, to Margaret Good, Assistant Public Defender, 9th Floor/Governmental Center, 301 North Olive Ave., West Palm Beach, Florida, 33401 this 5th day of December, 1989.

_____/s/_____
(Joan Fowler)
OF COUNSEL

IN THE

Supreme Court of Florida

JOHNNIE LEE JONES,

Petitioner,

vs. Case No. 74,004

STATE OF FLORIDA,

Respondent.

MOTION FOR REHEARING

Petitioner, JOHNNIE LEE JONES, requests this Court to grant rehearing to its decision of November 22, 1989, in light of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution for these reasons:

1. This Court's decision has overlooked petitioner's constitutional argument that once the trial court imposed a lawful sentence of 25 years imprisonment, giving three reasons for departure after the first appellate reversal, that Double Jeopardy principles prohibited the increase of that sentence to 50 years at the third resentencing. It is unconstitutional to increase a sentence after the prisoner has begun to serve it. *Troupe v. Rowe,* 283 So.2d 857 (Fla. 1973), *Ex parte Lange,* 18 Wall. 163, 21 L.Ed. 872 (1874), *United States v. Benz,* 282 U.S. 304,306, 51 S.Ct. 113, 75 L.Ed. 364 (1931). This violation of petitioner's Double Jeopardy protections is fundamental error, *State v. Johnson,* 483 So.2d 420 (Fla. 1986), which should be addressed by this Court on rehearing.

2. In petitioner's reply brief, filed after this Court's decision in *Roberts v. State,* 547 So.2d 129 (Fla. 1989), (which approved *Waldron v. State,* 529 So.2d 772 (Fla. 2d DCA 1988) and the Fourth District's decision in petitioner's case), petitioner argued that after his 25 year sentence was va-

cated and remanded for resentencing within the guideline range in *Jones v. State,* 526 So.2d 176 (Fla. 4th DCA 1988)(*Jones II),* that petitioner could not receive a more harsh sentence of 50 years imprisonment; Double Jeopardy prohibits this kind of increase of a lawful sentence. *Troupe v. Rowe, supra, Van Buren v. State,* 500 So.2d 732 (Fla. 2d DCA 1987), *Brown v. State,* 521 So.2d 110 (Fla. 1988), *Westover v. State,* 521 So.2d 344 (Fla. 2d DCA 1988). *See also Acosta v. State,* 489 So.2d 63 (Fla. 4th DCA 1986), affirmed on other grounds, *State v. Acosta,* 506 So.2d 387 (Fla. 1987).

3. There is no basis consistent with petitioner's constitutional protections against Double Jeopardy and fundamental principles of fair play to affirm that portion of the District Court's decision that allowed on resentencing an increase of 25 years imprisonment. Double Jeopardy prohibits the increase in sentence that occurred when the state, through neglect or oversight, failed to advance or discover their legal argument (now known as the *Roberts* exception) that petitioner could have received 50 years instead of 25 years on the second resentencing after the initial reversal pursuant to *Whitehead v. State,* 498 So.2d 868 (Fla. 1986).

Only a sentence of 25 years imprisonment, not as a habitual offender, may be sustained consistent with Double Jeopardy principles and established precedent from this Court.

WHEREFORE, petitioner respectfully requests this Court to grant rehearing to its decision of November 22, and to modify it to state that only a sentence of 25 years imprisonment may be sustained under the *Waldron / Roberts* rationale.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

/s/
MARGARET GOOD
Assistant Public Defender
Florida Bar No. 192356
15th Judicial Circuit
9th Floor, Governmental Center
301 North Olive Avenue
West Palm Beach, Florid 33401
(407) 355-2150

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 1 day of December , 1989.

/s/
MARGARET GOOD
Assistant Public Defender

Supreme Court of Florida

No. 74,004

Johnnie Lee Jones, Petitioner,

vs.

State of Florida, Respondent.

(November 22, 1989)

OVERTON, J.

We have for review *Jones v. State,* 540 So. 2d 245 (Fla. 4th DCA 1989)*[Jones III],* in which the district court affirmed a departure sentence imposed on remand. The underlying issue concerns the authority of the sentencing judge, in a recent resentencing proceeding, to depart from the recommended guidelines sentence. We accepted jurisdiction because of direct conflict with *Harrison v. State,* 523 So. 2d 726 (Fla. 3d DCA 1988). We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and approve the decision of the district court.

This case comes to us in a very unusual procedural posture. Jones was convicted in 1985 of third-degree murder, grand theft, and leaving the scene of an accident. The trial court sentenced Jones, solely under the habitual offender statute, to fifty years in prison. On appeal, the district court affirmed the convictions but determined that

> a finding that defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. *State v. Whitehead,* 498 So.2d 863 (Fla. 1986).
>
> In addition, the trial court failed to attach written reasons for departure.

Jones v. State, 502 So. 2d 1375, 1378 (Fla. 4th DCA 1987)*[Jones I].* The district court then remanded the case for resentencing.

At resentencing, the trial court determined that the recommended guidelines range was three to seven years. the trial court then imposed a twenty-five year sentence, giving three reasons for departure. On appeal, the district court held the sentence invalid, ruling that

> [b]ecause the sole reason initially given for departure from the guidelines, habitual offender status, was found invalid on appeal, the trial court cannot, upon resentencing, exceed the recommended sentence by ascribing the new reasons for departure. *See Shull v. Dugger,* 515 So.2d 748 (Fla. 1987).

Jones v. State, 526 So. 2d 173, 174 (Fla. 4th DCA 1986) *[Jones II].*

The mandate for *Jones II* was issued on July 8, 1988, and a third sentencing was held on August 11, 1988. The trial judge reimposed a fifty-year sentence; based upon Jones' habitual offender status and the prior departure reasons. The trial judge expressly relied upon the Second District Court's decision in *Waldron v. State,* 529 So. 2d 772 (Fla. 2d DCA 1988), released subsequent to *Jones II,* believing that *Waldron* allowed him to impose the initial fifty-year sentence. Jones filed a motion to enforce the *Jones II* mandate on August 12, 1988, one day after the resentencing. In so doing, he was seeking to have the trial judge impose the recommended guidelines sentence. This motion was granted on September 14, 1988. In the meantime, Jones timely filed an appeal from the August 11 resentencing. The state filed a motion for rehearing directed toward the order granting Jones' motion to enforce the mandate and also requested the district court of appeal to vacate the mandate enforcement order. On December 2, 1988, the district court

vacated its order enforcing the mandate and consolidated its *Jones II* decision with the notice of appeal from the third sentence.

In *Jones III,* the district court reconsidered its *Jones II* decision and affirmed the third sentence, noting that it previously had not addressed the adequacy of the reasons for departure in its *Jones I* decision and had relied on our decision in *Shull v. Dugger,* 515 So. 2d 746 (Fla. 1987), for its holding requiring a reversal of the sentence in *Jones II.* The district court recommended these decisions and, relying on the Second District Court's interpretation of *Shull* in its *Waldron* decision, concluded that the first sentencing of Jones, which resulted in a sentence enhanced by the application of the habitual offender statute, did not constitute a bar to subsequent enhancement of his sentence based upon written reasons supporting an upward departure from the sentencing guidelines' recommended range. Since the district court of appeal had jurisdiction to review the third sentencing, it also had the authority to change the law of the case previously set forth in *Jones I* and *Jones II. See Strazzulla v. Hendrick,* 177 So. 2d 1 (Fla. 1965).

In our recent decision in *Roberts v. State,* 547 So. 2d 129 (Fla. 1989), we approved *Waldron.* In *Roberts* and *State v. Betancourt,* NO. 73,806 (Fla. Nov. 22, 1989), we distinguished those resentencings where the judge in the original sentencing did not know that he had to set forth reasons for departure from those resentencings where the judge previously had departed from the guidelines and set forth reasons for departure.

In *Shull,* the judge imposed a sentence in excess of the guidelines recommendation for the announced reason that the defendant had been found to be an habitual offender. When this was determined to be an invalid reason for departure, this Court held that upon resentencing the trial

judge could not state new reasons for departure. Implicit in this ruling was our desire to preclude the possibility of a judge providing an after-the-fact justification for a previously imposed departure sentence. However, in the instant case, the judge simply sentenced Jones as an habitual offender. Neither the judge nor the counsel made any references to the sentencing guidelines, and the record contains no guidelines scoresheet. This was not a case where the judge relied upon a reason for departure that was later declared invalid but, rather, one in which the judge considered his sentence to be one to which the guidelines did not apply.

We find that the decision of the district court of appeal in *Jones III* is consistent with our decisions in *Roberts* and *Betancourt,* and that the conflict with *Harrison* has been resolved by those decisions. Accordingly, we approve *Jones III.*

It is so ordered.

EHRLICH, C.J., and McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

Johnnie Lee JONES, Appellant,

v.

STATE of Florida, Appellee.

Nos. 87-2427, 88-2449

District Court of Appeal
Fourth District

March 29, 1989.

HERSEY, Chief Judge.

As a result of being convicted in 1985 of murder in the third degree, grand theft and leaving the scene of an accident involving death, the appellant, Johnnie Lee Jones, was sentenced to a fifty-year term of imprisonment as an habitual offender.

On appeal to this court, the sentence was vacated as violative of *Whitehead v. State,* 498 So.2d 863 (Fla. 1986), and the case was remanded for resentencing. *Jones v. State,* 502 So.2d 1375 (Fla. 4th DCA 1987).

The trial court again imposed an enhanced sentence setting forth reasons for its upward departure from the sentencing guidelines. This court again reversed and remanded for resentencing. *Jones v. State,* 526 So.2d 173 (Fla. 4th DCA 1988). In that opinion we did not address the adequacy of the reasons for departure. We relied instead upon the rationale of *Shull v. Dugger,* 515 So.2d 748 (Fla. 1987). That case held that upon resentencing after reversal of a departure sentence grounded upon inadequacy of the initial basis for an upward departure from the sentencing guidelines the trial court may not again depart from the guidelines assigning new or different reasons for the subsequent departure.

The third sentencing of appellant again resulted in an upward departure from the sentencing guidelines. That sentence is the subject of the present appeal.

The issue is whether the initial sentencing of appellant, resulting in a sentence enhanced by application of the habitual offender statute, constitutes a bar to subsequent enhancement of his sentence based upon written reasons supporting an upward departure from the sentencing guidelines recommended range.

We hold that it does not. Our holding is based upon a finding from examination of the record that the initial sentencing was not intended by the trial court nor considered by the parties as a departure sentence with reference to the guidelines. Our legal conclusion is buttressed by a line of cases, spawned by the second district in *Waldron v. State,* 529 So.2d 772, 774 (Fla. 2d DCA 1988), which cases support a holding that "where a trial court does not provide reasons for departure and the sentence imposed is later determined to be a departure, the trial court must be given an opportunity to depart from the presumptive guidelines sentence after remand for resentencing." *See Brown v. State,* 535 So.2d 332 (Fla. 1st DCA 1988); *Roberts v. State,* 534 So.2d 1225 (Fla. 1st DCA 1988); *Dyer v. State,* 534 So.2d 843 (Fla. 5th DCA 1988); *State v. Wayda,* 533 So.2d 939 (Fla. 3d DCA 1988).

Finding that the stated reasons constitute a valid basis for an upward departure from the sentencing guidelines recommended range, we affirm.

AFFIRMED.

LETTS and WALDEN, JJ., concur.

Johnnie Lee JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 87-2427

District Court of Appeal of Florida,
Fourth District

June 1, 1988.

Rehearing Denied June 22, 1988.

HERSEY, Chief Judge.

Appellant was convicted of third degree murder, grand theft and leaving the scene of an accident involving death or injury. The trial court deviated from the guidelines on the basis that appellant was a habitual offender. This court reversed the departure sentence in *Jones v. State,* 502 So.2d 1375 (Fla. 4th DCA 1987), relying on *State v. Whitehead,* 498 So.2d 863 (Fla. 1986).

On remand the trial court found that the recommended guidelines range was three to seven years. The court then used three previously unarticulated reasons as grounds for aggravating the sentence to twenty-five years.

Because the sole reason initially given for departure from the guidelines, habitual offender status, was found invalid on appeal, the trial court cannot, upon resentencing, exceed the recommended sentence by ascribing new reasons for departure. *See Shull v. Dugger,* 515 So.2d 748 (Fla. 1987).

Shull holds that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an

appellate court. This is precisely the situation involved in the instant case except that the trial court called its re-departure an "aggravation" of the presumptive sentence. Whether called "departure" or "aggravation," the result is the same and, under Shull, is unacceptable.

REVERSED AND REMANDED FOR RESENTENCING WITHIN THE GUIDELINES.

LETTS and WALDEN, JJ., concur.

Johnnie Lee JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 85-2687.

District Court of Appeal of Florida,
Fourth District.

March 4, 1987.

STONE, Judge.

This is an appeal from a conviction and sentence for manslaughter and third degree murder.

Defendant stole a truck. In fleeing, he drove off with a great difficulty and found himself on a dead end street where he ran into a car and a fence. Driving erratically, he then collided with a truck. Defendant fled onto Sunrise Boulevard during rush hour when he lost control of the truck, drove over the median, and hit an oncoming car killing the driver. Defendant left on foot and shortly thereafter was himself struck while running across I-95. All of these events occurred over the course of approximately 20 minutes.

Following a jury verdict the trial court adjudicated the defendant guilty of third degree murder and withheld adjudication on the manslaughter verdict. The defendant was also determined to be a habitual offender. Appellant contends that the evidence was insufficient to sustain his convictions. With respect to the manslaughter verdict, we conclude that there was sufficient evidence of gross, flagrant, wanton and reckless conduct to sustain a conviction. *McCreary v. State,* 371 So.2d 1024, 1026 (Fla. 1979). As to

the third degree murder conviction, defendant relies on *Mahaun v. State,* 377 So.2d 1158 (Fla. 1979), contending that there was no causation between the theft and the accident. However, here there was sufficient evidence to conclude that the killing was part of the same incident as the felony. *See Jefferson v. State,* 128 So.2d 132 (Fla. 1961). *State v. Hacker,* 11 F.L.W. 1865 (Fla. 4th DCA Sept. 5, 1986), *clarified,* 11 F.L.W. 2182 (Fla. 4th DCA Oct. 15, 1986).

In *Campbell v. State,* 227 So.2d 873 (Fla. 1969), *cert. dismissed,* 400 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970), the court affirmed a felony murder conviction where a robbery defendant shot an officer after he was stopped at a roadblock. The supreme court held that the robbery had not ended. In the instant case, the defendant was fleeing in the stolen truck and had not yet reached a point of rest or safety when he struck the car on Sunrise Boulevard. Accordingly, there was also sufficient evidence to sustain the conviction for third degree murder.

Appellant next argues that he may not be convicted of both third degree murder and manslaughter for the same death. Appellant seeks to have the withheld adjudication stricken and asks that we direct entry of a judgment of acquittal as well. The state contends that manslaughter and felony murder are separate and distinct crimes.

In *Houser v. State,* 474 So.2d 1193 (Fla. 1985), the court held that the state may not obtain two homicide convictions for a single death. *Houser* is controlling in the instant case. *See also State v. Gordon,* 478 So.2d 1063 (Fla. 1985); *Thomas v. State,* 380 So.2d 1299 (Fla. 4th DCA), *rev. denied,* 389 So.2d 1116 (Fla. 1980); *Dorman v. State,* 492 So.2d 1160 (Fla. 1st DCA 1986); *Vela v. State,* 450 So.2d 305 (Fla. 5th DCA 1984); *Barber v. State,* 413 So.2d 482 (Fla. 2d DCA 1982); *Goss v. State,* 398 So.2d 998 (Fla. 5th DCA 1981); *Muzynski v. State,* 392 So.2d 63 (Fla. 5th DCA 1981). There is no need

in this case to engage in an extensive discussion of double jeopardy and the applicability of the test in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), because in Florida the legislature did not intend to punish the one death by multiple convictions under different statutes. *See Vela,* 450 So.2d at 305. *See also Gotthardt v. State,* 475 So.2d 281 (Fla. 5th DCA 1985).

The withholding of adjudication is a conviction for many purposes. *See Maxwell v. State,* 335 So.2d 658 (Fla. 2d DCA 197); Fla.R.Crim.P. 3.701(d). Therefore we reverse and vacate the withheld adjudication on the verdict of manslaughter.

Appellant next claims that he was not competent to stand trial. Appellant contends that, even in the absence of objection or motion, the court was required to, *sua sponte,* order a competency hearing under Florida Rule of Criminal Procedure 3.210(b). The trial court does have the duty to conduct a hearing on defendant's competency if it reasonably appears necessary. *Gibson v. State,* 474 So.2d 1183 (Fla. 1985); *Christopher v. State,* 416 So.2d 450 (Fla. 1982); *Rolle v. State,* 493 So.2d 2d 1089 (Fla. 4th DCA 1986). In the instant case, the defendant was confined to a wheelchair, and exhibited some confusion. The defendant did not, however, have a history of mental illness. Moreover, defense counsel in this case had actually requested that Jones be allowed to act pro se as counsel. The court had questioned the defendant and counsel incident to that request and was satisfied that the defendant was competent. As such, we conclude that the court did not err in its refusal to hold a competency hearing or in its determination that the defendant was competent to stand trial.

With regard to sentencing, the trial court found that appellant was a habitual offender and deviated from the guidelines on this basis. The supreme court has since deter-

mined that a finding that a defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. *State v. Whitehead,* 498 So.2d 863 (Fla. 1986).

In addition, the trial court failed to attach written reasons for departure. Simply checking a box in the judgment and sentence form is insufficient to satisfy the requirements of Florida Rule of Criminal Procedure 3.701. *See State v. Jackson,* 478 So.2d 1054 (Fla. 1985); *Boynton v. State,* 473 So.2d 703 (Fla. 4th DCA), *aff'd,* 478 So.2d 351 (Fla. 1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 1232, 89 L.Ed.2d 341 (1986); *Alford v. State,* 460 So.2d 1000 (Fla. 1st DCA 1984). We therefore reverse the defendant's sentence, and remand for resentencing. Since there will be resentencing, we do not reach the issues with respect to costs, but direct the trial court's attention to *Jenkins v. State,* 444 So.2d 947 (Fla. 1984).

We therefore affirm in part and reverse in part, and remand for resentencing.

DELL and GUNTER, JJ., concur.

ORIGINAL

No. 89-1876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

==========

STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE LEE JONES,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
9th Floor, Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Respondent

QUESTION PRESENTED

Respondent rephrases the question presented as follows:

When at a resentencing the trial court imposed a sentence of 25 years imprisonment and the defendant successfully appealed, but on remand a harsher sentence of 50 years was imposed due to a change in Florida law that occurred after the 25 year sentence was imposed, does the Florida Supreme Court's determination that the defendant was penalized for exercising his right to appeal and that only a 25 year sentence can stand present a question of federal Double Jeopardy law which this Court needs to address?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

No. 89-1876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

==========

STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE LEE JONES,

Respondent.

==========

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

For purposes of the argument below, respondent accepts the petitioner's statement of the case as substantially correct except as modified by the facts herein.

REASONS FOR DENYING THE WRIT

In 1987, at a resentencing, the trial court sentenced Mr. Jones to 25 years of imprisonment. This sentence was not subject to appeal by the state under Florida law. Mr. Jones did appeal, asserting that the sentence was excessive as a matter of Florida sentencing guideline law. The appellate court agreed Jones v. State, 526 So.2d 173,174 (Fla. 4th DCA 1980) (Jones II).[1] But on remand, the trial court sentenced Mr. Jones to 50 years of imprisonment. Ultimately, in the decision now under review, the

---

[1] The state did not seek review of this Jones II decision either in the Florida Supreme Court or in this Court.

Florida Supreme Court held that only a sentence of 25 years imprisonment could be imposed, that the increased sentence was vindictive because it resulted directly from Mr. Jones' exercise of his right to appeal. Jones v. State, 559 So.2d 204 (Fla. 1990).

A. THE DECISION OF THE LOWER COURT RESTS ON STATE LAW GROUNDS.

This cause involves Florida's scheme of sentencing guidelines. Under Florida law there is no basis for the state to appeal the trial court's decision not to sentence the defendant as a habitual offender. Herring v. State, 411 So.2d 966, 971 (Fla. 3d DCA 1982), footnote 1 (Baskin, J., concurring). Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987). The state cannot seek the subsequent enhancement of a legal sentence. Gilmore v. State, 523 So.2d 1244 (Fla. 2d DCA 1988); Cherry v. State, 439 So.2d 998 (Fla. 4th DCA 1983); Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984). Although the lower court ruled in part on North Carolina v. Pearce, 395 U.S. 711 (1969), it based its holding on two state law precedents, writing:

> However, as to this petitioner, the double jeopardy principles set forth in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the district court of appeal in Jones III were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have had the opportunity to apply that law had the petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence. Brown v. State, 521 So.2d 110 (Fla.), cert.denied, ___ U.S. ___, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); Troupe

> v. Rowe, 283 So.2d 857 (Fla.1973); Pearce. We agree with the petitioner that, while a departure sentence of more than three-to-seven years would stand because of the Waldron-Roberts rationale, the rationale cannot be used to impose a harsher departure sentence than that imposed in the second sentencing of this petitioner.

The Florida Supreme Court ultimately relying on state law precedents of Brown v. State, 521 So.2d 110 (Fla. 1988) and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), decided this issue concerning Mr. Jones' sentencing wholly under Florida's sentencing guidelines. Nevertheless, the state now seeks review of this state law issue in this Court. Although the state claims for the first time[2] conflict with the decision in United States v. DiFrancesco, 449 U.S. 117 (1980), the state argues in its petition that the lower court's reliance on state law was misplaced and in conflict with the very state law decisions on which it is based (Petition -11-13).

Examination of the state law precedents on which Jones' decision is based, Troupe v. Rowe, supra, and State v. Brown, supra, reveal that the Florida Double Jeopardy Clause has separate qualities from the Double Jeopardy Clause of the United States Constitution. Florida law recognizes the rule that a sentence may be increased only during the same term of court, that a sentence may not be increased once the defendant has begun to serve it.

---

[2] The brief of the petitioner in the Florida Supreme Court is contained in respondent's appendix and shows that petitioner never raised any issue concerning United States v. DiFrancesco. Petitioner's rehearing motion to the decision of the Florida Supreme Court is contained in petitioner's appendix. Petitioner never asserted conflict with DiFrancesco in that pleading either. (Petitioner's Appendix - 2-9).

Troupe v. Rowe, supra. This Florida rule originated independently from constitutional considerations, Beckom v. State, 227 So.2d 232 (Fla. 1969), and is part of the protections against double jeopardy under Article I, Section 19, Florida Constitution. Hinton v. State, 446 So.2d 712 (Fla. 5th DCA 1984).

B. THE DECISION OF THE LOWER COURT IS CONSISTENT WITH NORTH CAROLINA V. PEARCE.

The decision of the Florida Supreme Court in respondent's case is consistent with North Carolina v. Pearce, supra. Pearce held that although there is no constitutional bar to imposing a more severe sentence on retrial after appeal, due process requires that vindictiveness against the defendant for having taken a successful appeal "must play no part in" resentencing; valid reasons for a harsher sentence than previously imposed must affirmatively appear in the record and be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 725-726.

The Florida Supreme Court specifically determined that the increase in Mr. Jones' sentence resulted from his exercise of his right to appeal: "Although a change of law subsequently occurred which would have permitted imposition of the initial 50 year sentence, the district court of appeal would not have had the opportunity to apply that law had the petitioner not appealed the second sentence." Jones v. State, 559 So.2d at 206. Hence, Mr. Jones was penalized for exercising his right to appeal so that the 50 year sentence is illegal under North Carolina v. Pearce. This is a factual determination of vindictiveness pertaining to a sentencing issue by the state's highest appellate court. As such,

it is a factual finding with which this Court cannot disagree. See Cabana v. Bullock, 474 U.S. 376 (1986).

Clearly, the reason for a harsher sentence advanced by the petitioner here, a change in law to the defendant's detriment which occurred after the time that the lesser sentence was imposed does not square with Pearce's requirements that a defendant not be penalized for exercising his right to appeal.

Jones appealed this second sentence claiming it was contrary to the holding of Shull v. Dugger, 515 So.2d 748 (Fla. 1987), that the 25 year sentence was an unauthorized upward departure from the guidelines recommended range of three to seven years based on new reasons for departure that were not given at the first sentencing hearing. The District Court of Appeal, Fourth District of Florida agreed, and, citing to Shull v. Dugger, remanded for a sentence of not more than three to seven years. Jones v. State, 526 So.2d 173 (Fla. 4th DCA 1988) (Jones II).

Due to a change in the sentencing guidelines law that occurred in Waldron v. Sta[illegible] 529 So.2d 772 (Fla. 2d DCA 1988), decided after the decision in Jones II, which position the state never argued or raised during respondent's second resentencing nor second appeal, the trial court determined not to impose the three to seven years as ordered by the district court in Jones II. Instead, the trial court sentenced respondent to 50 years as an habitual offender giving written reasons for departure and asking the district court to reconsider the propriety of the order to sentence

within the guidelines in light of the new decision in Waldron.[3] When respondent appealed claiming the trial court erred in failing to follow the mandate, the district court approved the rationale of the Second District Court in Waldron and held that after an appellate reversal for failure to follow the guidelines, where the trial court did not realize that the initial sentence was a departure, on resentencing the trial court should have one opportunity to impose a guideline departure sentence giving written reasons for departure, Jones v. State, 540 So.2d 245 (Fla. 4th DCA 1989) (Jones III). In essence, the Florida Supreme Court's decision in Jones holds that one opportunity was the first resentencing at which the 25 year sentence was imposed.

The decision in Jones III represents an exception to the previously established rule that if the trial court sentenced the defendant outside the guidelines solely because it found the defendant to be a habitual offender, then on remand no new reasons for departure could be given and a guideline sentence had to be imposed. Shull v. Dugger, 515 So.2d 748 (Fla. 1987). Pursuant to its discretionary review the Florida Supreme Court approved the rationale of the District Court in Jones III but held that the law prohibited imposition of a harsher sentence of 50 years after the

---

[3] Petitioner's claims that "[w]ith the benefit of the clarified case law, upon the second remand, the trial judge reinstated the original sentence imposed on Respondent" (Petition - 13). But these sentences were very different, as the first sentence of 50 years contained no written reasons for departure. An even newer change in Florida sentencing guideline law, occurring after the Florida Supreme Court's Jones decision, now requires that a sentence without written reasons for departure must be reversed to be remanded for resentencing within the guidelines recommended range. Pope v. State, 561 So.2d 554 (Fla. 1990), Ree v. State, 15 FLW S395 (Fla. July 19, 1990).

respondent's successful appeal of his 25 year sentence. Jones v. State, 559 So.2d 204 (Fla. 1990).

The change in law by the Waldron decision occasioned the potential for vindictiveness. Respondent appealed his second sentence of 25 years in the belief that the guidelines constrained the trial judge's ability to depart a second time after the first departure sentence was reversed. Existing case law supported respondent's position. Shull v. Dugger, supra, Jones II. Respondent's "reward" for winning his second appeal from the 25 year sentence was not the three to seven year sentence which the district court ordered and which respondent anticipated, Jones II, but rather imposition of a harsher 50 year sentence under a new provision of law of which respondent had no notice or knowledge at the time he appealed the sentence of 25 years. The decision of the Florida Supreme Court that affirmance of the reimposed 50 year sentence penalized respondent for exercising his right to appeal is completely consistent with Pearce's requirements.

C. THERE IS NO CONFLICT BETWEEN THE LOWER COURT DECISION AND UNITED STATES V. DIFRANCESCO.

The state now claims for the first time a conflict with United States v. DiFrancesco (see footnote 2, supra). However, even had the state cited DiFrancesco to the Florida Supreme Court, that authority would have been unavailing. DiFrancesco contains a prime distinguishing feature, not available to the state under Florida law, which robs the state's argument of any claim of conflict. Although Florida's habitual offender statute is similar to the statute considered in DiFrancesco, it does not authorize a state appeal. Herring v. State, supra. The sentencing court's view on

resentencing that Whitehead v. State, 498 So.2d 863 (Fla. 1986), prohibited reimposition of the habitual offender sentence was not appealable by the state inasmuch as the 25 year sentence was within the statutory maximum. Doe v. State, 492 So.2d 842 (Fla. 1st DCA 1986), Senior v. State, supra.

Respondent's lack of notice or knowledge at the time he appealed his 25 year sentence that the then non-existent Waldron exception would be law two years in the future at the time of resentencing after successful appeal, is another feature of his case that completely distinguishes it from DiFrancesco. In DiFrancesco this Court found no violation of the guarantee against multiple punishments in the Organized Crime Control Act of 1970, which granted the United States the right to appeal a special dangerous offender sentence under specified conditions. Significant to the Court's decision in DiFrancesco was the defendant's awareness that a dangerous special offender sentence is subject to increase on appeal; because the defendant was charged with knowledge of the statute and its appeal provisions, he had no expectation of finality in his sentence until the government appeal was concluded or the time to appeal had expired. Unlike the statutory provisions applicable to DiFrancesco's sentence, here the State of Florida had no right to appeal the respondent's sentence of 25 years. Thus, in appealing that sentence as violative of the established rule of Shull v. Dugger, the respondent had an expectation of finality that the sentence could not be increased due to a change in the law to his detriment. Since the state may not seek to increase a lawful sentence once it is imposed in Florida, the respondent was entitled to pursue his second appeal confident that

a change of law to his detriment could not be applied to him and that no increase in his sentence was possible if he won on an appeal, subject to the protections enunciated in North Carolina v. Pearce.

Respondent submits that the decision below was well-founded based on settled principles of Florida law, and that it is not in the slightest conflict with precedent from this Court on Double Jeopardy protections. Petitioner has failed to demonstrate that any "special and important" reason exists to warrant this Court's attention to the Jones' decision from the Florida Supreme Court. Rule 17.1, Supreme Court Rules.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities cited herein, Johnnie Lee Jones, Respondent, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
9th Floor, Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Respondent

No. 89-1876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

==========

STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE LEE JONES,

Respondent.

==========

A P P E N D I X

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
9th Floor, Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Respondent

INDEX TO APPENDIX

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,004

JOHNNIE LEE JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

JOAN FOWLER
Assistant Attorney General
Florida Bar No. 339067
111 Georgia Avenue - 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

LIST OF CITATIONS

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner, JOHNNIE LEE JONES, was the defendant, and Respondent, STATE OF FLORIDA, was the prosecution, in the sentencing proceedings held in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The following symbols will be used:

"PA" - Petitioner's appendix to his brief on the merits.

"Ex" - Exhibit Letter within Respondent's Appendix.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was originally sentenced to fifty (50) years imprisonment for the crimes of third-degree murder, grand theft and leaving the scene of an accident. At this sentencing hearing, the State requested that Petitioner be sentenced as a habitual offender (Ex. B, p. 3-5). When given the opportunity to address sentencing concerns, both Petitioner and his counsel indicated they had nothing to say, and that no legal cause existed to prevent imposition of sentence (Ex. B, p. 4). The Circuit Court, the Honorable Judge Stanton Kaplan presiding, made the necessary predicate findings, under §775.084, et seq., Fla. Stat. (1983), that Petitioner had a prior felony conviction, and that the present felonies occurred within 5 years of the prior conviction (Ex. B, p. 5, 6). The Court concluded that habitual offender classification was necessary, for the protection of the public (Ex. B, p. 6), and enhanced Petitioner's sentence to 30 years for third-degree murder, 10 years for grand theft, and 10 years for leaving the scene of an accident, involving death or serious injury (Ex. B, p. 6-8). At a subsequent hearing, held on November 25, 1985, concerning Petitioner's Motion to Mitigate, Petitioner argued that due to the loss of his leg, he was not a threat to the community, and thus should not be classified as a habitual felony offender (Ex. B, p. 10-13). At all times, during the sentencing and mitigation hearing, there were no references

made to guidelines sentencing, no such election by Petitioner, and no such intentions expressed, by the State, or trial court. On appeal from this sentence, Petitioner argued, inter alia, that "the trial court reversibly erred in failing to sentence him under the Rule 3.701 sentencing guidelines," and "the trial court erred in finding and sentencing [him] as a habitual offender" (Ex. F).

Subsequent to this Court's ruling in Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987) (hereinafter referred to as "Jones I"), Judge Kaplan held a resentencing proceeding on August 13, 1987 (Ex. C, p. 1-17). The Circuit Court determined the recommended range under the guidelines to be 3-7 years (Ex. C, p. 13). The Court entered three reasons for departure from this range:

> 1) Jones' escalating pattern of criminal conduct, exhibited by two prior burglaries, an attempted strong-arm robbery of an 80-year old woman, including physical contact, and the subject crime, third-degree murder;
>
> 2) The timing of the offense, committed 33 days after Petitioner's release from prison, on the attempted strong-arm robbery conviction; and
>
> 3) Jones' reckless flight from the scene of the crime, which exhibited extreme risk to others.

(Ex. C, p. 13-15). The Court stated that, if any one of these reasons were later held invalid, he would impose the same sentence, based on the remaining valid reasons (Ex. C, p. 15). The judge imposed a 25-year sentence, and rejected the State's

request that Petitioner be classified as a habitual offender. (Ex. C, p. 15). In declining to classify Petitioner in this manner, Judge Kaplan again noted that he initially sentenced Petitioner as a habitual offender, but had not done so as a departure sentence (Ex. C, p. 15-16).

Subsequent to this Court's ruling in Jones v. State, 526 So.2d 173 (Fla. 4th DCA 1988) (hereinafter "Jones II"), the Circuit Court held another resentencing proceeding on August 11, 1988 (Ex. A).

The State maintained that new case law, issued since the Fourth District Court of Appeal's mandate in Jones II, permitted the Circuit Court to classify Petitioner as a habitual offender, and enter a departure sentence beyond the 3-7 year recommended range (Ex. A, p. 4-9). Judge Kaplan reviewed the history of Petitioner's sentencing proceedings (Ex. A, p. 10-21). The Circuit Court judge reiterated that he had initially sentenced Petitioner as a habitual offender, and that based on then-existing case law, did not consider or contemplate that sentence to be a guidelines departure sentence (Ex. A, p. 10-12). Judge Kaplan then concluded that, on the basis of Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988), a departure sentence was permissible and appropriate on resentencing, since no original departure sentence was imposed on Petitioner (Ex. A, p. 18-21). The judge made it clear that he was not imposing the sentence out of any disrespect

SUMMARY OF THE ARGUMENT

I. The Fourth District Court of Appeal's opinion affirming Petitioner's departure sentence was legally correct. As there was originally no departure sentence, the case fell within the recent case law that holds that Shull v. Dugger should be limited to cases where there was originally a departure sentence.

II. By filing a Notice of Appeal, Petitioner invoked the Fourth District's jurisdiction to review the Circuit Court's August, 1988 sentencing ruling. Further, "law of the case" is not a static rule, and need not be applied to correct earlier erroneous rulings and to avoid injustice.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY AFFIRMED PETITIONER'S DEPARTURE SENTENCE, SINCE HIS ORIGINAL SENTENCE WAS NOT A GUIDELINES SENTENCE, AND THE REASONS GIVEN FOR DEPARTURE WERE VALID.

Although the Fourth District Court of Appeal originally held in error that the Circuit Court departed from the sentencing guidelines based on Petitioner's habitual offender status (Jones I), it is clear that this was not what was contemplated by the State, Petitioner, or the Court. Since the original sentence was not a guidelines departure sentence, there was no error under Shull v. Dugger, 515 So.2d 748 (Fla. 1987) to depart from the sentencing guidelines upon resentencing. The Fourth District Court of Appeal properly so held.

In his brief on his first appeal, Petitioner argued that the trial court erred by not sentencing him under the guidelines (Ex. F). Petitioner noted that "[t]he guidelines were not mentioned during the sentencing hearing," and there was nothing to indicate that the trial judge ever reviewed the guidelines scoresheet which was part of the supplemental record (Ex. F, p. 3). Thus, Petitioner has already conceded the very point he is attempting to make to this Court.

In response to Petitioner's initial brief in Jones I, the State argued in the alternative that habitual offender status

or disregard for the Fourth District Court of Appeal or its prior rulings, but was seeking that Court's reevaluation of the circumstances of Petitioner's sentencing proceedings, in view of the Waldron decision (Ex. A, p. 18-22, 26). Based on these considerations, Judge Kaplan classified Petitioner as a habitual offender, and imposed a 50-year sentence based on the same departure reasons entered previously (Ex. A, p. 22-26). Judge Kaplan additionally noted that he was imposing such a sentence, in the interest of justice, and in light of the "chaos" and "confusion" over guidelines sentencing (Ex. A, p. 22).

The Fourth District Court of Appeal consolidated Jones II with the appeal from this latest resentencing, and approved the sentence imposed by the Circuit Court. Jones v. State, 540 So.2d 245 (Fla. 4th DCA, 1989) (Jones III). Petitioner sought review of the Fourth District Court of Appeal's opinion, and this Court granted jurisdiction and these briefs follow.

POINTS ON APPEAL

POINT I

WHETHER THE DISTRICT COURT PROPERLY AFFIRMED PETITIONER'S DEPARTURE SENTENCE, SINCE HIS ORIGINAL SENTENCE WAS NOT A GUIDELINES SENTENCE, AND THE REASONS GIVEN FOR DEPARTURE WERE VALID?

POINT II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ACTED APPROPRIATELY WITHIN ITS JURISDICTION TO CORRECT THE ERROR IN JONES I, AND AFFIRM PETITIONER'S GUIDELINES DEPARTURE SENTENCE?

was a proper basis for a guidelines departure sentence. The State's argument was based upon a presumption for the purpose of argument that there was a guidelines sentence. This position was warranted due to the flux in the status of the sentencing guidelines at the time of this first appeal, and because it was the appropriate response to the way Petitioner framed his arguments.

It is clear from a review of the three transcripts of the sentencing hearings that at the time of the original sentencing, Petitioner, his attorney, the assistant state attorney, and the trial judge did not contemplate that Petitioner was being sentenced under the guidelines (Ex. A, B, C). Therefore, Shull v. Dugger does not apply to the instant case, as Petitioner was sentenced originally outside the guidelines as a habitual offender. There was no departure sentence. It was through recognition of this that the Fourth District Court of Appeal held that Shull v. Dugger was not controlling. Jones III. Morganti v. State, 524 So.2d 641 (Fla. 1988), is also distinguishable from the case at bar since in Morganti habitual offender status was originally given as a guidelines departure reason.

At the August 11, 1988 sentencing hearing (Ex. A), Judge Kaplan specifically observed that in his initial sentencing of Petitioner, he had invoked the habitual felony offender statute

by itself to sentence Petitioner, and that habitual offender status was not used as a guidelines departure reason (Ex. A, p. 10-11). Judge Kaplan related that he had applied the habitual felony offender statute, and entered the required findings of the existence of three prior violent felonies committed by Petitioner within a 5-year period, to extend the maximum penalties of Petitioner's three crimes (for murder, 15 to 30 years; grand theft, 5 to 10 years, and leaving the scene of an accident involving death or serious personal injury, from 5 to 10 years), for a total of 50 years (Ex. A, p. 11). The Circuit Court emphasized that "at that time, the State did not request, nor did I suggest, that these grounds of habitual offender status were grounds for aggravation under the guidelines" (Ex. A, p. 11).

A review of both prior sentencing hearings, on November 12, 1985 (Ex. B) and August 13, 1987 (Ex. C), completely substantiates the conclusion that Judge Kaplan's original offender sentence did not involve a departure sentence. The State requested that Petitioner's sentence be enhanced as a habitual felony offender to 50 years, and made no reference to the guidelines (Ex. B, p. 2-5). Judge Kaplan made the necessary predicate factual findings, and sentenced Petitioner to 50 years as a habitual felony offender, with no reference to guidelines or guidelines departure (Ex. B, p. 5-8). The record shows no guidelines scoresheet was prepared or referred to, and defense

counsel made no request of or reference to guidelines sentencing (Ex. B, p. 4). Subsequently, at Jones' second sentencing hearing in August, 1987 (Ex. C, p. 1-17), Judge Kaplan, in declining to find Appellant to be a habitual offender, recalled that the had "already declared him a habitual offender, but not as grounds for aggravation" of sentence (Ex. C, p. 15-16).

At the time of Petitioner's original sentencing, it was permitted to sentence a defender under the habitual offender status, outside of the sentencing guidelines. Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2nd DCA 1984). That Petitioner was not sentenced under the guidelines is also supported by the fact that there were no written reasons given for the departure sentence, which was required for a guidelines departure at the time of his sentencing. See e.g., State v. Jackson, 478 So.2d 1054 (Fla. 1985).

In Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988), the Second District Court of Appeal unanimously held en banc that a guidelines departure sentence was appropriate on resentencing since the original sentence was not considered to be a departure although the appellate court later found that it was. Shull v. Dugger was thus not applicable, and Waldron limited the holding of Shull.

The underlying rationale of Waldron limits Shull to factual circumstances where a trial court initially offered

reasons for departure, and at least one of the reasons is found to be invalid. Shull then forbids a trial court from relying on "new" reasons for departure on re-sentencing. Such limitations are designed to prevent trial courts from obtaining a "second bite of the apple," and from repeatedly imposing newly created reasons to justify the original sentencing. Shull v. Dugger, 515 So.2d at 750. Such concerns are not present when the trial court did not impose a departure sentence to begin with. Waldron; Daughtry v. State, 521 So.2d 208 (Fla. 2nd DCA 1988) (trial court did not enter departure sentence; after sentencing, appellate decision viewed trial court's sentence as departure sentence; on remand, trial court has opportunity to enter departure sentence).

The results and reasoning in Waldron should be applied in this case with equal force. Judge Kaplan clearly did not originally impose a guidelines departure sentence upon Petitioner. As in Waldron and Daughtry, subsequent appellate decisions later determined that the sentence imposed was a departure sentence. Jones I; Jones II. Because Petitioner's present sentence is not an attempt at after-the-fact justification of an original departure sentence, said sentence does not violate Shull. Judge Kaplan's exercise of an opportunity to enter a departure sentence on resentencing is thus entirely appropriate under Waldron, and is not manipulative in effect, under Shull.

Significantly, several recent decisions from the First, Second, Third and Fifth Districts, have adopted Waldron, and have approved departure sentences, imposed on resentencing, in situations quite similar to this case. In Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988), a trial court originally imposed a sentence, based on an incorrect scoresheet. On remand, the trial court imposed a departure sentence. Id. The First District rejected the argument that Shull prevented a guidelines departure resentencing. Id. The Court found that since no original departure sentence occurred, Shull was inapplicable. Id. Roberts has been approved by this Court. Roberts v. State, 14 F.L.W. 387 (Fla. July 27, 1989). In Roberts, this Court specifically approved the opinion of the Fourth District Court of Appeal below. Id. Similarly, in Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988), a trial court imposed a sentence that it believed to be within the guidelines, and that an appellate court later viewed as constituting a guidelines departure sentence because of application of the guidelines in effect on the date of the crime. Id. The First District determined that, on remand, the trial court could impose a departure sentence, citing Waldron and Roberts in support of its conclusion that the Shull proscriptions were inapplicable. Brown, at 2678.

The Fifth District applied Waldron, with approval, in Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988). The trial court

therein imposed a sentence it believed to be within the guidelines, which on appeal was determined to be a departure sentence, because the combined community control and probation term exceeded the guidelines range. The Fifth District determined that, based on Waldron, the trial court could impose a departure sentence on remand, because the trial judge did not originally contemplate or believe he was entering a guidelines departure sentence. Id. The Fifth District panel based this conclusion on examination of the trial judge's statements at the original sentencing proceeding. Id. Similar examination and focus here leads to the exact same conclusion as in Dyer, and requires a similar result.

Petitioner has relied on the Third District's decision in Harrison v. State, 523 So.2d 726 (Fla. DCA 1988. Harrison was disapproved by this Court in Roberts v. State, 14 F.L.W. 387 (Fla. July 27, 1989).

It is therefore clear that in every one of the appellate districts that have considered the issue since Waldron, the appellate courts have unanimously concluded that a trial court may resentence a defendant, by guidelines departure if the court so chooses, if that court did not originally enter or contemplate a departure sentence. This Court has also so held. Roberts; Brown; Wayda; Dyer; Waldron; Daughtry. Each of these decisions has specifically rejected the applicability of the Shull

prohibitions, that Petitioner has relied on here, after determining from the record that the trial judge did not originally impose a departure sentence, or state any reasons for departure. Id. There is little doubt that Judge Kaplan, in his original sentence, did not rely on guidelines departure. Under Waldron, and its progeny, the significant and unanimous weight of present, appellate authorities mandates affirmance of Petitioner's present departure sentence, and rejection of the applicability of Shull, as argued by Petitioner.

Petitioner argues that the State has taken inconsistent positions regarding the propriety of his sentence. The State would remind Petitioner that Respondent has consistently been in the position of responding to Petitioner's arguments, and the rulings of the Fourth District Court of Appeal, which has necessitated alternative arguments. Further, the State has been acting merely as an advocate, and it is the role of the reviewing court to determine whether the trial court acted appropriately. If a trial court ruling can be upheld for any reason, even a reason not articulated by or to the trial court, the reviewing court must affirm the ruling. Stuart v. State, 360 So.2d 406 (Fla. 1978); Caso v. State, 524 So.2d 422 (Fla. 1988). Further, the attorneys for the State could not have been expected to foresee changes in the law. The attorneys for the State would have been shirking their duties to the people of this State, and

most especially to the family of Christine Gregory, the murder victim in this case, if they failed to make every possible argument to support the trial court's rulings.

The opinion of the Fourth District Court of Appeal in Jones III should be upheld by this Honorable Court. Roberts v. State.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL ACTED APPROPRIATELY WITHIN ITS JURISDICTION TO CORRECT THE ERROR IN JONES I, AND AFFIRM PETITIONER'S GUIDELINES DEPARTURE SENTENCE.

Petitioner argues that the Fourth District Court of Appeal was without jurisdiction to consider the merits of the Circuit Court's August 1988 sentencing order due to the earlier issuance of mandate. This argument ignores one basic fact: Petitioner himself filed a Notice of Appeal from the sentencing, which invoked the jurisdiction of the Fourth District Court of Appeal. Petitioner's attempts to argue to this Court that this Notice did not matter, and that he planned to dismiss the appeal are without legal and record support. The plain facts are that Petitioner himself invoked a new appeal, and he ought not to be heard to complain now merely because he did not prevail. Respondent also asserts that it was within the discretion of the Fourth District Court of Appeal to consider the Circuit Court's ruling on a full appeal, and to consider within that appeal the issue of compliance with that court's earlier mandate. Considering the issues during the normal course of an appeal is certainly preferable to ruling without the benefits of a complete record, and full briefing by the parties. It was under these latter circumstances that the Fourth District Court of Appeal issued its order enforcing mandate, an order which was later

vacated. The issuance of mandate in Jones II did not preclude consideration of the merits of the August 1988 sentencing ruling.

Contrary to Petitioner's argument, law of the case doctrine does not inflexibly require that a prior appellate court ruling be absolutely maintained in all situations and circumstances. It is apparent that an appellate court may reconsider a prior ruling to avoid "manifest injustice," correct errors previously made, and address subsequent circumstances or decisions which alter the prior result when applied. Fyman v. State, 450 So.2d 1250, 1252, n. 3 (Fla. 2nd DCA 1984); Preston v. State, 444 So.2d 939, 942 (Fla. 1984); Blackhawk Heating & Plumbing Company, Inc. v. Data Lease Financial Corporation, 328 So.2d 825, 827 (Fla. 1975); Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla. 1965); Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604, 607-608 (Fla. 1953) (on motion for rehearing). Such reexamination is particularly appropriate where the Fourth District Court of Appeal's September 14, 1988 ruling enforcing mandate was made without having the benefit of a transcript of the sentencing hearing in which Judge Kaplan set forth his reasoning and reliance on the post-Jones II opinion in Waldron. See, Fyman, 450 So.2d at 1252, n. 3; Blackhawk Heating & Plumbing, 328 So.2d at 827; Strazzulla, 177 So.2d at 4; Beverly Beach Properties, 68 So.2d at 607, 608; see also, Escrow Disbursement Insurance Agency v. American Title & Insurance Company, 550 F. Supp. 1192, 1196-

1197 (So.Dist. Fla. 1982); Compton v. Societe Eurosuisse, S.A., 494 F. Supp. 836, 839, n. 12 (So.Dist.Fla. 1980). Under these circumstances, it would have been erroneous to view "law of the case" as a static rule to prevent merits review by the Fourth District Court of Appeal.

Respondent would again note that on his appeal in Jones I, it was Petitioner himself who argued that it was error not to sentence him within the guidelines. In Jones III, the Fourth District Court of Appeal merely reconsidered this argument. For this reason as well, Petitioner has invited the Court's ruling in Jones III.

Due to the interests of justice, and for the purpose of correcting an earlier error, the Fourth District Court of Appeal acted legally in revisiting its holding in Jones I and Jones II while affirming the departure sentence in Jones III. There was no procedural error, and the opinion of the Fourth District Court of Appeal must stand.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities, Respondent respectfully requests that this Court affirm the opinion of the Fourth District Court of Appeal in Jones III.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

JOAN FOWLER
Assistant Attorney General
Florida Bar No. 339067
111 Georgia Avenue - 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded, by courier, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 2nd day of August, 1989.

Of Counsel

STATE OF FLORIDA
Office of the Public Defender
FIFTEENTH JUDICIAL CIRCUIT
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401

RICHARD L. JORANDBY
Public Defender

Telephone (407) 355-2100

Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
First and Maryland Avenue, N.E.
Washington, DC 20543

September 12, 1990

RE: State of Florida v. Johnnie Lee Jones
Case No. 89-1876

Dear Mr. Spaniol:

I have enclosed the following documents for filing:

1. Respondent's Brief in Opposition;
2. The Appendix thereto;
3. Motion for Leave to Proceed In Forma Pauperis with attached Affidavit;
4. Affidavit of counsel concerning mailing; and
5. Certificate of Service

I appreciate your kind assistance in the filing of these documents.

Very truly yours,

Margaret Good

Margaret Good
Assistant Public Defender

MG/gms
Enclosures

cc: JOAN FOWLER, Esq.
Assistant Attorney General